No. 91-2029

In the Supreme Court of the United States

OCTOBER TERM, 1992

JRR REALTY & HOLLAND HOUSE TENANTS CORP.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board acted within its discretion in ordering petitioners—an employer and its successor—to make retroactive contributions to the union's benefit funds.

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. A1-A6) is unpublished, but the judgment is noted at 955 F.2d 764 (Table). The supplemental decision and order of the National Labor Relations Board (Board) (Pet. App. A11-A64), which includes the decision of the administrative law judge, is reported at 301 N.L.R.B. No. 67.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1992. A petition for rehearing was

denied on April 23, 1992. The petition for a writ of certiorari was filed on June 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 31, 1981, petitioner J.R.R. Realty Co. (JRR) purchased an apartment building in Queens, New York, which was owned by JARU Properties, Inc. and ASCR Realty, Inc. and managed by J.A.R. Management Corp. (JAR). JAR had entered into a collective bargaining agreement with Local 32B-32J, Service Employees International Union, AFL-CIO (Union), covering the six service employees who worked at the apartment building. On April 1, 1981, JRR discharged the six employees and refused to recognize or bargain with the Union.

In a subsequent unfair labor practice proceeding, the Board, in agreement with the administrative law judge (ALJ), found that JRR violated Section 8(a)(3) and (1) of the National Labor Relations Act (Act) (29 U.S.C. 158(a)(3) and (1))[1] by discharging the employees because of their membership in and support of the Union, and in order to evade its bargaining obligations as a successor employer under *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972). *J.R.R. Realty Co.*, 273 N.L.R.B. 1523, 1526-1527 (1985). The Board also found that JRR, as successor employer, violated Section 8(a)(5) and (1) of

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[1] Section 8(a)(3) makes it an unfair labor practice for an employer to engage in "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce" the exercise of rights protected by Section 7 of the Act, 29 U.S.C. 157.

the Act (29 U.S.C. 158(a)(5) and (1))[2] by refusing to bargain with the Union as the employees' representative, and by refusing to honor the collective bargaining agreement between JAR and the Union, which the Board determined JRR had adopted when it purchased the building. 273 N.L.R.B. at 1526, 1529. The Board, accordingly, ordered JRR to offer reinstatement to the six discharged employees, to bargain with the Union as the exclusive representative of its employees, and to honor and give retroactive effect from April 1, 1981, to the terms and conditions of the collective bargaining agreement, "including payment of wages and benefits as prescribed" in the agreement. *Id.* at 1529.[3] The Second Circuit enforced the Board's order, holding that substantial evidence supported the Board's findings that JRR had adopted JAR's labor contract and committed unfair labor practices. *NLRB* v. *Babad*, 785 F.2d 46, 50 (1986), cert. denied, 479 U.S. 830 (1986).

2. The Board's Regional Director then initiated a compliance proceeding against JRR and petitioner Holland House Tenants Corp. (Holland House), which had purchased the apartment building from JRR in June 1984, while the ALJ's decision in the unfair labor practice case was pending before the Board. Pet. App. A32 n.4. The Board's General Counsel sought retroactive payment of wages and contributions to the Union's health and pension funds on behalf of the six illegally discharged service employees and those

[2] Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."

[3] Petitioners' statement (Pet. 12) that the Board's order "does not directly order payments to the [f]unds" is incorrect. Fund contributions are a "benefit" provided the members of the bargaining unit by the "terms and conditions" of the contract. Pet. App. A44-A45.

persons whom JRR hired to replace them. *Id.* at A30, A39. In its answer to the Regional Director's amended backpay specification, Holland House admitted that it is a successor employer to JRR and that, prior to acquiring the apartment building from JRR, it was on notice of JRR's potential liability in the unfair labor practice case. *Id.* at A32.

After a hearing, the ALJ ruled that "[i]n order to remedy the unlawful refusal by J.R.R. to honor its contract with the Union * * * [JRR and Holland House] must restore the status quo ante to that which existed from April 1, 1981, when J.R.R. refused to honor its contract and unilaterally altered the terms and conditions of employment of the employees in the appropriate unit represented by the Union." Pet. App. A42-A43. Accordingly, relying on settled Board law,[4] the ALJ recommended that the Board order petitioners to make payments to the Union's benefit funds for a complement of six employees for the period April 1, 1981, through December 31, 1988. *Id.* at A44, A64.[5] The ALJ rejected the contention that, because JRR had never employed more than four service workers after it assumed operation of the building, petitioners should be required to make

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[4] *Seascape Golf Course*, 294 N.L.R.B. 881 (1989); *Achilles Constr. Co.*, 290 N.L.R.B. 240 (1988), enf'd mem., 875 F.2d 308 (2d Cir.), cert. denied, 493 U.S. 823 (1989); *Beitler-McKee Optical Co.*, 287 N.L.R.B. 1311 (1988).

[5] Before the hearing, the parties settled the Regional Director's backpay claim for that time period (Pet. App. A16 & n.8, A29), but litigated the amount of backpay owed by petitioners after January 1, 1989. The ALJ determined, and the Board agreed, that employees employed after January 1, 1989, are entitled to wages and fringe benefits, such as paid holidays and vacations, that are prescribed in the collective bargaining agreement. *Id.* at A54-A59, A16-A17. Petitioners do not seek further review of that ruling.

contributions for only four, not six, employees. *Id.* at A48. The ALJ also rejected Holland House's argument that it is not liable for JRR's unfair labor practices. The ALJ noted that, under *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168 (1973), a successor employer who purchases a business with knowledge of its predecessor's potential unfair labor practice liability is liable for remedying the predecessor's unfair labor practices. Pet. App. A40-A41. Holland House is obligated to make the Union funds whole, the ALJ determined, because Holland House admitted that it is a successor employer to JRR and knew of JRR's potential liability in the unfair labor practice proceeding when it acquired the apartment building from JRR. *Ibid.*

The ALJ found no merit in Holland House's contention that it cannot be ordered to restore the *status quo ante* under *Golden State* because such an order improperly requires it to assume JRR's labor contract. Pet. App. A43. The ALJ recognized that, under *NLRB* v. *Burns International Security Services, Inc.*, *supra*, the Board cannot bind a successor employer to the terms and conditions of the predecessor's collective bargaining agreement, but ruled that, since Holland House was a *Golden State* successor, it was required to remedy JRR's unfair labor practices. Pet. App. A43. Moreover, the ALJ found that Holland House could not avail itself of a successor's freedom, provided by *Burns*, to fix its initial terms and conditions of employment without bargaining with the Union. Since Holland House had made it "perfectly clear" that it intended to continue to employ the bargaining unit when it succeeded JRR, the ALJ determined that *Burns* required Holland House to consult with the Union before fixing initial terms. *Id.* at A41.

The Board affirmed those rulings by the ALJ in a supplemental order. The Board agreed with the ALJ that petitioners should be required to restore the *status quo ante*, retroactive to April 1, 1981, and determined that petitioners must make contributions on behalf of six (not four) employees "in order to ensure the actuarial soundness of the funds." Pet. App. A15, A17 & n.11.[6] Accordingly, the Board ordered petitioners to pay $69,287.34, plus interest, to the Union pension fund and $122,448.94, plus interest, to the Union health fund. *Id.* at A26. The Board found no merit to petitioners' contention that they are liable to the Union's funds only to the extent that the funds paid benefits to members of the bargaining unit. The Board distinguished *Coletti Color Prints, Inc.*, 204 N.L.R.B. 647 (1973), upon which petitioners' argument primarily relied, since *Coletti* involved an agreement with a union that "lost a Board election after the agreement expired and, further, involved school and medical insurance funds from which the employees could benefit only during the life of the contract which required such payments." Pet. App. A15 n.7. By contrast, the Board found that "the Union here continues to be the employees' bargaining representative and the unit employees have an interest in the continuance of the funds and their financial stability."[7] *Ibid.*

[6] The Board, in agreement with the ALJ, determined that the collective bargaining agreement and the funds' trust agreement provided for payment of liquidated damages to the funds, at the discretion of the fund trustees. Pet. App. A21 n.16. The Board thus required petitioners to pay liquidated damages only if the fund trustees decided to impose them. *Ibid.*

[7] The Board modified the ALJ's decision in two respects. First, the ALJ had not ordered petitioners to make contributions to the Union's pension fund on behalf of the six illegally discharged employees for the periods during which they are

3. The court of appeals enforced the Board's supplemental order in an unpublished memorandum decision. The court ruled that, since the Board's order in the unfair labor practice proceeding required petitioners to honor the labor contract, the Board did not abuse its discretion in ordering petitioners to make retroactive contributions to the Union's benefit funds. Pet. App. A4. The court rejected petitioners' claim that they are liable to the funds only to the extent claims were actually made against them, finding that "[e]ven if the union fund meets 'the present needs of its employees, the diversion of contributions from the union funds undercut the ability of those funds to provide for future needs.'" *Ibid.*, quoting *Stone Boat Yard* v. *NLRB*, 715 F.2d 441, 446 (9th Cir. 1983). Further, the court ruled that, because Holland House is "clearly the successor to [JRR]" and had admitted that it "took control with knowledge of [JRR's] entanglement with the [Board]," Holland House was obliged to remedy JRR's unfair labor practices under *Golden State*.[8] Pet. App. A5.

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entitled to receive backpay. The Board agreed with the General Counsel that petitioners are liable for those contributions. Pet. App. A13. Second, the ALJ construed the collective bargaining agreement, which was effective April 1979 to April 1982, to provide that petitioners would follow any increase in benefit-fund contribution rates negotiated between the Union and the Realty Advisory Board (RAB) in 1981, but not any later negotiated increases. The Board agreed with the Union that the collective bargaining agreement requires petitioners to follow increases negotiated by the Union and the RAB in both 1981 and in 1984. *Id.* at A20.

[8] The court of appeals also affirmed the Board's construction of the benefit increase provision in the collective bargaining agreement, Pet. App. A4-A5, and the Board's disposition of the liquidated damage issue, *ibid.* See notes 6-7, *supra*. Petitioners do not seek further review of those rulings.

ARGUMENT

1. Petitioners contend (Pet. 10-15) that the Board's supplemental order requiring them to make retroactive benefit fund contributions is "punitive" and therefore beyond the Board's remedial authority under Section 10(c) of the Act, 29 U.S.C. 160(c). That contention lacks merit. It is, of course, well settled that the Act is "essentially remedial," *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 10 (1940), and that Section 10(c) "does not authorize punitive measures," *NLRB* v. *Strong Roofing & Insulating Co.*, 393 U.S. 357, 359 (1969). "[M]aking the workers whole for losses suffered on account of an unfair labor practice," however, "is part of the vindication of the public policy which the Board enforces." *Ibid.*, quoting *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197 (1941). In *Strong Roofing*, this Court upheld a Board order which directed the employer to make payments to the union's benefit funds according to the terms of the collective bargaining agreement that the employer had repudiated in violation of the Act. The Court explained:

> Whether the payments were made to the employees, who then contributed them to union trust funds in the form of higher union dues, or whether as here they passed straight from the employer to the trust funds * * * it is just as much in the interest of "effectuat[ing] the policies of this Act," and of making the employees whole, to require the payments in either case.

393 U.S. at 360 n.4.

The Board ordered the same type of make-whole relief in its supplemental order here. Employer contributions to fringe benefit funds are the equivalent of wages that the employees have earned by their labor. See *Strong Roofing*, *supra*; *Artim Transp. Sys. Inc.*,

193 N.L.R.B. 179, 184 (1971); *Hen House Market No. 3*, 175 N.L.R.B. 596, 596 (1969), enf'd *sub nom. Hinson* v. *NLRB*, 428 F.2d 133 (8th Cir. 1970). The Board, with court approval, has often ordered the offending employer to make retroactive payments of all benefit fund payments required by the collective bargaining agreement in order to restore the *status quo ante*. See, *e.g.*, *Achilles Constr. Co.*, 290 N.L.R.B. 240 (1988), enf'd mem., 875 F.2d 308 (2d Cir.), cert. denied, 493 U.S. 823 (1989); *Kraft Plumbing & Heating, Inc.*, 252 N.L.R.B. 891 (1980), enf'd mem., 661 F.2d 940 (9th Cir. 1981); *Michigan Drywall Corp.*, 232 N.L.R.B. 120 (1977), enf'd, 616 F.2d 966 (6th Cir. 1980); *Hen House Market No. 3, supra*. The Board's supplemental order simply requires petitioners to make contributions to the Union's funds as required by the collective bargaining agreement. Pet. App. A21-A25.

Petitioners assert (Pet. 11, 14) that requiring them to make retroactive benefit fund contributions is "punitive" and constitutes a "windfall" for the Union because there has been no showing of losses to the employees. The Board and the court of appeals correctly rejected that assertion. Unlike in *Coletti Color Prints, Inc.*, 204 N.L.R.B. 647, where the union had lost a Board election after the collective bargaining agreement had expired and the employees could benefit from the funds only during the life of the expired agreement, here, the Union continues to represent the bargaining unit and the employees have a continuing interest in the funds. Pet. App. A15 n.7; *Pacific Aggregates, Inc.*, 231 N.L.R.B. 214, 221-222 (1977); *Argano Elec. Corp.*, 248 N.L.R.B. 352, 360-361 (1980). Even though the funds may be able to meet the employees' present needs, the absence of benefit contributions would compromise the funds' ability to provide for their needs in the future.

There is no merit to petitioners' contention (Pet. 12-15) that the decision below conflicts with *Manhattan Eye Ear & Throat Hosp.* v. *NLRB*, 942 F.2d 151 (2d Cir. 1991). In that case, the Board required an employer to make retroactive contractual payments to union-sponsored benefit funds, even though the employer had provided alternative benefits coverage for its employees and the employees had decertified the union that negotiated the plans and had disclaimed any interest in future coverage under those plans. 942 F.2d at 154-155, 159. The Second Circuit declined to enforce the Board's order, holding that it was error to require contractual payments to the union's benefit funds "regardless of the nature or scope of the substitute benefits provided to the employees in the interim." *Id.* at 159. This case implicates none of the concerns identified in *Manhattan Eye*. Here, the employer did not provide substitute, non-contractual benefits; moreover, the members of the bargaining unit continue to be represented by the union that negotiated the benefit plans, and have never disclaimed their contractual right to coverage under those plans. Pet. App. A15 n.7, A33, A34, A35. *Manhattan Eye* is therefore inapplicable here.[9]

Petitioners also make several factbound objections to the nature of the evidence underlying the Board's order, none of which warrants further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-

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[9] The *Manhattan Eye* court emphasized that it was not questioning the Board's power "to order imposition of the *status quo ante* in other cases where an employer unilaterally discontinues payments to union-sponsored benefit funds." 942 F.2d at 159. The court was careful to limit its ruling to situations in which the employees involved "were compensated during the relevant period by substitute benefit plans and who * * * disclaimed any present or future interest in being covered by the [union-sponsored plans]." *Ibid.*

491 (1951). In any event, those objections lack merit. Contrary to petitioners' contention that all of the employees' claims under the funds were settled, see Pet. 14, the parties settled only the backpay claims of the discharged employees, and those employees who replaced them, for the time period prior to January 1, 1989; the Regional Director's corresponding claims for fund contributions were not settled. Pet. App. A16 n.8, A29; see note 5, *supra*. Petitioners are also incorrect in claiming (Pet. 14-15) that, because the discharged employees refused reinstatement, they retained "no further economic interest in the [Union funds'] future." The discharged employees retain an interest in the funds because their right to receive benefits in the future depends on their having been covered by Union contracts for a specified minimum length of time, and the Union continues to be their collective bargaining representative.[10] Pet. App. A15 n.7; *Argano Elec. Corp.*, 248 N.L.R.B. at 361.

2. Holland House contends (Pet. 15-21) that it is not liable as a successor employer for contributions to the Union's benefits funds. The court of appeals correctly held that Holland House "is clearly the successor to J.R.R." and that, as it had notice of the unfair labor practice charge, it is liable under *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168 (1973). Pet. App. A5.[11]

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[10] The Regional Director noted in his amended backpay specification that three of the discharged employees had found other jobs covered by Union contracts. C.A. App. 140 n.1.

[11] In passing, Holland House suggests (Pet. 17) that it was "questionable" whether it had knowledge of JRR's unfair labor practices when it acquired the building. Not only did Holland House make an admission to the contrary in the Board proceedings, Pet. App. A32, it knew of JRR's potential liability through Chaim Babad, who was a partner in JRR and is the majority shareholder in Holland House. *Id.* at A41. Indeed,

Holland House nevertheless contends that the Board's order conflicts with the principle announced in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), that a successor is ordinarily free to establish its own terms of employment. Relying on *Martin J. Barry Co.*, 278 N.L.R.B. 393 (1986), and *Sea Bay Manor Home for Adults*, 301 N.L.R.B. No. 71 (Jan. 31, 1991), Holland House asserts that it is not liable for contributions that accrued *after* it acquired the apartment building from JRR in 1984. In *Martin J. Barry Co.* and *Sea Bay Manor Home*, the Board ordered the successor employer to restore the *status quo ante* as prescribed by its predecessor's collective bargaining agreement, but ruled that the successor's obligation to maintain the *status quo ante* ended as of the date that the successor assumed operation of the predecessor's business. In each case, the Board determined that even though the new employer was a successor under *Golden State Bottling Co.* v. *NLRB*, *supra*, a *Golden State* successor retains the freedom afforded a successor employer by *Burns* to refuse to honor the terms of his predecessor's labor agreement.[12] Accordingly, the Board ruled that the successor could not be ordered to maintain the *status quo ante* beyond the date it commenced operations because that requirement would be tantamount to forcing the successor to honor the predecessor's collective

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Babad was "the main actor in the commission of the violations [of the Act] by [JRR]." *Id.* at A43; *J.R.R. Realty Co.*, 273 N.L.R.B. at 1525-1526.

[12] In *Burns* the Court held that a successor employer is not bound to observe the substantive terms of his predecessor's collective bargaining agreement, 406 U.S. at 291; the successor "is ordinarily free to set initial terms on which it will hire the [predecessor's] employees." *Id.* at 294.

bargaining agreement. *Martin J. Barry Co.*, 278 N.L.R.B. at 394-395; *Sea Bay Manor Home*, slip op. at 2-3, 5-6.

Those cases, however, did not involve a successor who, like Holland House, made it "perfectly clear" (*Burns*, 406 U.S. at 294-295) that it was continuing the employment of the predecessor's employees under the preexisting terms of employment, and, indeed, manifested an intention to honor its predecessor's labor contract when it commences operations. Such a successor does not have complete freedom to establish its initial terms unilaterally. Rather, as the Court explained in *Burns*, when it is "perfectly clear that the new employer plans to retain all of the employees in the unit," it may "be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." *Ibid.* In this case, the ALJ found, and the Board implicitly agreed, that, because Holland House had made it "perfectly clear" that it was continuing the employment of JRR's workforce, Holland House could not, under *Burns*, set its own initial terms without first bargaining with the Union. Pet. App. A41; *Burns*, 406 U.S. at 294-295. Holland House does not challenge that ruling here.

Both before the Board and in the court of appeals Holland House agreed that it was "'perfectly clear' that the replacement[] [employees] * * * would not have any changes imposed on them on Holland House's takeover." Pet. C.A. Br. 21; Pet. Board Br. 13. Similarly, the ALJ found that Holland House subsequently informed the Regional Director that it would abide by JRR's collective bargaining agreement. Pet. App. A35. Accordingly, the Board's order requiring Holland House to make payments to the Union's funds accruing after it commenced operation of the apartment building is consistent with the

framework of rules governing a successor's obligations under *Burns* and with Board precedent applying those rules.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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